



P R O C E E D I N G S

(Court in session at 10:00 a.m.)

**THE COURT:** Okay. We're here in Farley against Eye Care Leaders, 22CV468. That's the lead case -- there have been a bunch of them that have been consolidated -- for what we all hope is the final approval of the settlement in this matter, class action settlement.

I sent you all, or Ms. Winchester did on my behalf, a couple of emails with questions that I had.

I don't expect any of these answers to cause problems, but I did want to be sure that I was fully examining it in view of the fiduciary obligations that the Court has to the classes, and just to be sure I was understanding correctly.

I think probably my biggest question is, for the physician class, the claims against these other two insurance companies and, you know, it is still a class action. I certified the class. What's going to happen there? Do I still have that? Do I have to approve any settlement you reach with those other two insurance companies and the attorney's fees? I mean, there is a one-third fee agreement for that in there, but that all got to explain that to me.

I just want to know -- it seems to me that I might still need to be involved, if and when you get any money out of those folks.

Of course if you have to file a lawsuit and it is

1 somewhere else, then maybe it should be somebody else who looks  
2 at it. I don't know the answer to that. That probably is sort  
3 of the biggest piece that I was not real sure about.

4 Everything else I think was kind of technical.

5 Me get everybody to introduce themselves for the  
6 record.

7 Here for the plaintiff?

8 **MS. WHITE:** Lisa White from the Mason firm.

9 **THE COURT:** Okay.

10 **MS. MARTIN:** Good morning, Your Honor, Jean Martin  
11 from Morgan and Morgan, on behalf of the patient class.

12 **THE COURT:** Hold on. I've been in court so much I've  
13 run out of ink in my pens. I have got another one.

14 **MR. FERGUSON:** Good morning, Your Honor, Russ  
15 Ferguson of Womble, Bond, Dickinson, here on behalf of the  
16 physician class. I'm here with Patrick Spaugh, who has the  
17 answers to your questions.

18 **MR. SPAUGH:** Good morning, Your Honor.

19 **THE COURT:** Good morning.

20 Here for the defendants?

21 **MR. NELSON:** Yes, Your Honor, Kip Nelson from Fox,  
22 Rothchild.

23 **THE COURT:** Mr. Lindberg is keeping us all busy. I  
24 think every judge in the state -- I think -- this one, I mean,  
25 it does touch on his problems, but probably the least directly

1 of anything else that I've got going on involving him.

2 I don't know how you all want to do this. You know,  
3 I've read everything, as is probably obvious from those  
4 incredibly detailed questions that I asked you. I have got an  
5 order pretty much read but, you know, it looks to me  
6 like -- this is the same thing I said at preliminary approval.  
7 The only money is the insurance money. You are getting all of  
8 the insurance money. It is being divided equitably or equally  
9 among the class members. Really, that's about it, and  
10 everything else is just detail.

11 So that seems quite fair to me still. I read  
12 everything. You know, I would like to know a little bit more  
13 about it, so maybe I'll just turn it over to plaintiffs'  
14 counsel, and one of you all can start and, hopefully, you'll  
15 answer all of my questions and tell me anything else that you  
16 want me to now.

17 **MR. SPAUGH:** Patrick Spaugh, again from Womble, Bond  
18 Dickinson. My plan is to go over the questions that you've  
19 asked with respect to them being globally applicably, or  
20 specific position class. Then I'll let Ms. Martin handle the  
21 rest, and let Mr. Nelson maybe handle some of the Colorado  
22 Banker Life Insurance questions that you had.

23 So let me start with your primary concern for today's  
24 hearing, and that's the approval of the attorneys' fees coming  
25 out of the insurance -- the two assigned insurance policies.

1           Your question is: Does that require me to issue a  
2 future approval of those fees? Can I do that now? What is  
3 that going to look like? Do I retain jurisdiction? Those are  
4 all very fair questions.

5           Our first position is, no, Your Honor, that does not  
6 require separate class action settlement approval. The reason  
7 being is, these are claims by ECL against its insureds. So the  
8 defendants, they are the insureds. They are the ones that have  
9 the rights under the insurance policies to those proceeds that  
10 have submitted claims that have been rejected by their  
11 insurers.

12           So to the extent that there is a coverage dispute,  
13 that is defendant's coverage dispute that they have. It is not  
14 the classes coverage dispute. The class doesn't have claims  
15 against those insurers.

16           The only reason that the class comes into play is  
17 because ECL has assigned its rights under those policies to the  
18 class. So the class is just standing in the shoes of the  
19 rightful insurance holder to pursue the proceeds that we  
20 believe should have been provided to the defendant. It is not  
21 really a class action settlement, because it is not really a  
22 class action dispute. It is really a dispute between the  
23 defendant and the insureds.

24           **THE COURT:** Right. But you, as representing that  
25 class and pursuing those rights, still have obligations to the

1 class. I mean, your obligations are to the physician class,  
2 not to the defendant. Right?

3 **MR. SPAUGH:** Absolutely, Your Honor, that is correct.

4 **THE COURT:** That is where I'm getting a little  
5 glitched up, because you -- I don't think you can settle that,  
6 for example, without court approval. Right?

7 **MR. SPAUGH:** So what we believe is, that by  
8 approving -- if the Court approves this settlement agreement,  
9 and this settlement agreement provision that we would retain 33  
10 percent, that approval alone is enough. Any future settlement  
11 claim would actually be subsumed in that.

12 It is kind of like the movie Inception, it is a dream  
13 within a Dream. It is a settlement within a settlement.

14 **THE COURT:** I guess -- I kind of have less problems  
15 with the attorneys' fees, and maybe I didn't actually ask this  
16 next part directly, but let's just imagine, okay, I have no  
17 idea, but pick a policy, there is a million dollars in  
18 coverage, they've denied. You are negotiating with them. You  
19 agree with them on behalf of the class to settle for \$400,000.  
20 I'm just making the numbers up, because I have no idea. Well,  
21 that is a settlement on behalf of the class, who holds the  
22 rights assigned from the defendant. So doesn't that have to be  
23 approved?

24 I really didn't have a problem with a third of  
25 whatever you are able to work out with them because I've been

1 approving attorneys' fees for a zillion years, and I'm familiar  
2 with the circumstances, but it is a little funny to have  
3 advanced approval of a fee from that unknown settlement.

4           If you have to go sue them and you get a judgment,  
5 you know, maybe you're even entitled to more than a third at  
6 that point, though. I assume you would be able to resolve that  
7 on papers without a trial.

8           Do you see what I am saying?

9           **MR. SPAUGH:** I do. I understand the Court's pause  
10 and caution here. I'll again go back to, while the proceeds  
11 from any settlement would be distributed to the class or any  
12 portion of attorneys' fees, it is still on behalf of the  
13 defendants, rather than the class. It is just the class  
14 receives the proceeds that should have gone to ECL, or to the  
15 defendants.

16           That said, Your Honor, I do believe that -- well, all  
17 of us here believe that this settlement before you, given the  
18 limited fund nature is already a fair and adequate settlement,  
19 so what we would be doing is at most, increasing the pot. The  
20 pot will not be reduced whatsoever. Any proceeds that are  
21 coming here are proceeds that are going to increase the amount  
22 going to the class.

23           To the extent that the Court is inclined to approve  
24 the settlement in the amounts that have been provided to the  
25 class members as already drafted, then anything in addition

1 would just be on top of that.

2           So even if the Court looks at it from the perspective  
3 of, this does require class action approval within this  
4 context, the 33 percent, as you mentioned, is appropriate and  
5 the percentage method here.

6           This isn't the type of dispute that we're going to  
7 call them up and they are just going to write a check, because  
8 ECL tried that. They rejected it.

9           One of them filed a declaratory judgment action in  
10 this Court, which was then dismissed through the agreement of  
11 ECL, without prejudice. There is going to incentivize be a  
12 dispute, and that 33 percent protects the class because it  
13 incentivizes us to do the work to go after that money for them  
14 on their behalf.

15           **THE COURT:** I get that. But most lawsuits settle,  
16 and that's kind of where I'm wondering about it, because it is  
17 one thing if you sue them or they sue you, they sue ECL and you  
18 all defend it in a DJ action and it goes to verdict, judgment,  
19 maybe for the class, maybe not. Fine, one-third divided  
20 equally, it is all clear.

21           What if you -- it is likely to settle, maybe. I  
22 don't know, but that's often what happens, maybe less often in  
23 insurance coverage cases than others, so isn't that -- if it  
24 settles, your client -- what is now the classes claim by  
25 assignment against this insurance company, or both of them, one



1 of them or the other or both, doesn't a judge have to approve  
2 that as fair and reasonable?

3           **MR. SPAUGH:** Your Honor, I think that's what you  
4 would be doing here, and I think what you would be doing is,  
5 saying that the amount of the physician fund that is going to  
6 the physician settlement class members is already fair and  
7 reasonable. To the extent that any additional amount is added,  
8 that's necessarily fair and reasonable as a result. I think  
9 that something --

10           **THE COURT:** Part of what makes it fair and reasonable  
11 is that you got this assignment.

12           **MR. SPAUGH:** Correct.

13           **THE COURT:** So --

14           **MR. SPAUGH:** If I could add a few different notes on  
15 top of that. I do want to point out that we are not opposed to  
16 coming back before the Court and getting approval. This is  
17 just a matter of us trying to be, I think all of us  
18 collectively, including the Court, identifying the most  
19 efficient way of handling this. It is not a matter of us being  
20 afraid of, oh gosh, the Court may not approve whatever  
21 settlement we ultimately --

22           **THE COURT:** No, absolutely not. You all are not  
23 going to take -- I have every confidence that you would enter  
24 into an appropriate settlement. But still, the rules say that  
25 class action settlements have to be approved by a court.

1 Right?

2           **MR. SPAUGH:** I think that's correct, and I think that  
3 here, again, the Court is already approving this settlement  
4 that provides for this specific method of recovery against the  
5 insurance policy.

6           **THE COURT:** So who is going to decide to take a  
7 settlement offer from the insurance company? Am I entrusting  
8 the lawyers? Are the class representatives still making that  
9 -- who is making that decision to settle? It just seems like I  
10 might have to approve it.

11           **MR. SPAUGH:** And that's fair. If the Court  
12 ultimately determines that that is ultimately -- that's fair by  
13 us. We believe that it is fine either way, frankly, and we're  
14 just trying -- what we would request, though, is that the  
15 ultimate distributions to the class members and to the  
16 attorneys that they are not held up.

17           **THE COURT:** Absolutely, not held up.

18           **MR. SPAUGH:** One other thing I would note in terms of  
19 just the general fairness, why we believe the Court can approve  
20 this now is, the fact that we sent out 5,000 direct notices,  
21 and no one has objected to this recovery. So we think that  
22 that is a further line of support.

23           That's really all I have to cover on that position,  
24 unless the Court has any questions.

25           **THE COURT:** I really didn't have any problem with it.

1 I don't know why it took me so long to say, wait a minute, this  
2 is a little bit of a problem here, to be clear, because I  
3 didn't realize it until fairly late last week, and I could have  
4 realized it a year ago, or whenever you all first settled it,  
5 but I didn't.

6 **MR. SPAUGH:** You are correct, the defendants would  
7 not be the ones who would retain the decision in terms of who  
8 is accepting or approving the settlement.

9 **THE COURT:** Right.

10 **MR. SPAUGH:** It would be the physician settlement  
11 class counsel, along with the physicians and some of the class  
12 representatives who would be responsible, absent the Court  
13 approval.

14 **THE COURT:** So do you have any anticipation -- or  
15 expectation, might be a better word at this point about those  
16 two insurance policies and where that might be resolved?

17 **MR. SPAUGH:** I think it is going to be hard fought.  
18 We have not engaged in negotiations because the assignment is  
19 not effective until the settlement agreement is approved.

20 I know that they attended the Court's remote  
21 hearing -- one of the insurers attended the Court's remote  
22 hearing on the preliminary approval. I'm not sure who is in  
23 the gallery. Maybe somebody is here on one of those policies,  
24 but we do anticipate that it will be hard fought.

25 **THE COURT:** You don't have any idea where?

1           **MR. SPAUGH:** Where, I believe it would be in this  
2 court. I believe it would be in the Middle District.

3           **THE COURT:** Well, that simplifies things, because  
4 until I give up the ghost and retire, which is not happening  
5 tomorrow, you know, it could come to me, and then it would kind  
6 of be a moot point, because I could take care of it then.

7           If it was going to end up in like Indiana or some  
8 place, you know -- not that there is anything wrong with  
9 Indiana, I just pulled that out of the air.

10          **MR. SPAUGH:** I do think it is North Carolina, because  
11 that's where the declaratory action was filed by one of the  
12 insurers, and that's where the defendants were located, was in  
13 Durham.

14          **THE COURT:** Go ahead.

15          **MR. SPAUGH:** The next question you had, Your Honor,  
16 was the affect of the bankruptcy on the settlement and how that  
17 was worked out. So I think that's a helpful time for us to  
18 talk about something unanticipated that happened, but I'll  
19 admit, we are proud of the results that we obtained on behalf  
20 of the settlement classes in the context of that bankruptcy.  
21 We were just as surprised as the Court was when ECL filed for  
22 bankruptcy there. We did find that it further illustrates the  
23 limited funds at issue here.

24          **THE COURT:** Exactly.

25          **MR. SPAUGH:** It is kind of a perfect example of why

1 this is this specific type of settlement, but once they did  
2 that, you know, we immediately took action to try to say, well,  
3 how can we protect these class interests. We worked with the  
4 physician class representative. I know the patient class  
5 worked with one of their representatives, and we obtained seats  
6 on the secured creditors committee, and that involved  
7 preparation for interviews and attending --

8 **THE COURT:** Slow down.

9 **MR. SPAUGH:** Yes, I apologize. And being prepared to  
10 represent the classes' interest, but really on behalf of all of  
11 the secured creditors.

12 So the next step was, that they identified a buyer,  
13 and that buyer, as you know, is Colorado Bankers Life  
14 Insurance, and that's where things got a little bit squirrely  
15 and, the reason being is, that the buyer wanted to essentially  
16 purchase the assets as it would to do in this Chapter 11  
17 Bankruptcy, and it wanted to do so free and clear of any  
18 obligations under the settlement agreement, because in its  
19 mind, we're not parties to the settlement agreement, and the  
20 Court hasn't granted final approval of the settlement  
21 agreement, so why should we assume these obligations.

22 That required us to fight vigorously in a number of  
23 ways. One was, to insure that the claims bar date for the  
24 bankruptcy was extended until after the determination of  
25 whether or not the Court will grant final approval of the

1 settlement, because initially the claims date in the bankruptcy  
2 matter had been identified as before this Court's resolution,  
3 so of course if you're a party to the settlement agreement  
4 where you are agreeing to release your claims and you don't  
5 know if that is going to be final or not, it would have been  
6 really unfortunate, had that date passed and then been cut out  
7 and then this Court ultimately potentially denying settlement.  
8 So we insured that it would proceed in an orderly fashion so  
9 that these class members, to the extent that the Court  
10 ultimately doesn't grant final approval, which we hope that you  
11 do, that they would have the ability to protect their rights  
12 within the bankruptcy, and file a claim there.

13           The next step is on the ultimate assignment of the  
14 underlying contract. If we go back to the beginning and look  
15 at the disputes about you got these physician practices, you  
16 have these underlying contracts with ECL to provide these  
17 medical records, software services or billing services, and  
18 those are the services at issue --

19           **THE COURT:** Slow down.

20           **MR. SPAUGH:** -- and what gives rise to the entire  
21 dispute. And of course we have the patients of those  
22 practices.

23           Now, those practices -- the rights that they have  
24 through the settlement agreement are not just they are going to  
25 get a payment from the physician settlement fund. It is also

1 that they are going, to the extent they are still under  
2 contract as of last year when the agreement was entered into,  
3 they received contractual credits towards their account. They  
4 would also receive the right to terminate the agreements. They  
5 would also receive a number of other nonmonetary provisions and  
6 relief therein.

7           In addition to that, ECL has an ongoing obligation as  
8 a part of this litigation, to maintain its books and records.  
9 Well, what we did was, we had to object, because they were  
10 going to proceed with the sale, and the buyer was taking the  
11 position that we get the contracts with none of the attachments  
12 of the settlement agreement. So essentially, it would have  
13 left the settlement class with no rights under the settlement  
14 agreement except as to the defendants, who at that point, don't  
15 have the contracts provide the credits. They don't have the  
16 contracts, or the termination right doesn't matter. It's been  
17 assigned.

18           So one of our attorneys, a partner and colleague out  
19 of New York, he flew down to Dallas multiple times to attend  
20 contested evidentiary hearings, cross-examine multiple  
21 witnesses, and ultimately as a result of his efforts, we were  
22 able to secure language in the sale order that insured that  
23 those settlement rights would transfer with the contracts. So  
24 that was really important.

25           Aside from those components, the only other real

1 impact of the bankruptcy was delay, frankly, in getting to this  
2 point.

3 I am happy to answer any other questions the Court  
4 has about the bankruptcy, but those are the real issues that  
5 we've identified.

6 **THE COURT:** It was my understanding that the  
7 bankruptcy wasn't going to mess with the insurance proceeds  
8 coming over under the settlement, but the noncash part benefits  
9 to the physician class were a problem, and then the risk to  
10 both classes, if for some reason the settlement wasn't  
11 approved. So you all took care of all that and you got the  
12 full benefit of the settlement agreement with the buyer?

13 **MR. SPAUGH:** Yes, Your Honor. The settlement  
14 agreement will be honored by every one involved in the  
15 bankruptcy, and all the provisions will still be fully  
16 enforced.

17 **THE COURT:** Okay.

18 **MR. SPAUGH:** Your next question was about Colorado  
19 Bankers Life Insurance and their involvement. So they are one  
20 of the entities that is in rehabilitation by the State of North  
21 Carolina. They are one of the plaintiffs of the underlying  
22 lawsuits against Greg Lindberg and his related entities that  
23 resulted in the memorandum of understanding. They are a party  
24 to that memorandum of understanding that requires that all of  
25 the defendant's assets be transferred essentially to them,



1 excluding the insurance proceeds at issue here. So they are  
2 recipients of those proceeds, and that is the order that the  
3 superior court judge in North Carolina ordered specific  
4 performance of, and then also entered a temporary restraining  
5 order in the action where they are plaintiff.

6           So they are fully in the midst of getting money there  
7 and that's why they are so protective against, I think,  
8 anything that could count against that. They are trying to  
9 make sure that they get a recovery themselves.

10           **THE COURT:** I mean, yeah, they want to protect the  
11 insureds.

12           **MR. SPAUGH:** Exactly.

13           **THE COURT:** And ended up in a pretty untenable  
14 position.

15           **MR. SPAUGH:** That's right. I do want to go back to  
16 the bankruptcy for one second, Your Honor. I don't know if  
17 this is in the record for our pleadings, but the Court could  
18 likely take judicial notice of it, but the next sale proceeds  
19 are expected to be approximately 13.2 million dollars in the  
20 bankruptcy sale. The topline number was 14.5 million, but it  
21 is subject to certain deductions, and of those 13.2 million  
22 dollars, there are secured creditors who have liens on ECL's  
23 assets, defendant's assets, that far exceed that amount.

24           So what that means is, to be clear, just because  
25 there is a sale in bankruptcy that results in 13.2 million

1 dollars on ECL, it is not as though that money is now available  
2 to go to the class members.

3 **THE COURT:** Because they are all unsecured?

4 **MR. SPAUGH:** Correct. So the only relief that they  
5 are going to obtain is if the unsecured creditors are able to  
6 work out a negotiation in some settlement, but that's not  
7 required and hasn't happened, and that's why the settlement  
8 agreement is so important for the class members.

9 **THE COURT:** Okay.

10 **MR. SPAUGH:** The next question that I think you had  
11 as to the physician settlement class is, how much can each  
12 member expect to receive.

13 **THE COURT:** I know there is no way to calculate that  
14 with precision but, you know, just kind of a rough idea.

15 We can be fairly precise based off the claims to  
16 date, but the ultimate claim submission deadline, as the Court  
17 notes is, July 24th, so it is possible that there could be  
18 additional claims submitted by then.

19 I will note in the month since -- approximate month  
20 since the declaration by the settlement administrator, there  
21 have not been any additional claims, because most of those  
22 claims were operating under the pre-bankruptcy timeline that we  
23 got to get this thing in, you know, around March or so.

24 There have been 199 claims to date. The physician  
25 settlement class fund amount is \$1,460,449.50. If the Court

1 were to approve the attorneys' fees, expenses, service awards  
2 and settlement administrative expenses, administration  
3 expenses, and deduct that amount from the 1.46 million, that  
4 leaves \$647,228.05. If you divide that by the 199 claims to  
5 date, that results in approximately \$3,252.40 per claim to each  
6 physician settlement class member who submits a valid claim.

7           Baked into that number is, some information that the  
8 Court also requested separately and that was information about  
9 the administration cost to date. That information is not in  
10 the record, however, we conferred, and we would be happy to  
11 work with the settlement administrator and provide a supplement  
12 declaration, at the Court's request, or to help the Court on  
13 the specific numbers that I'm about to provide you.

14           So the total cost to date of the settlement  
15 administrator are \$329,622.71. And that's broken out by -- for  
16 the patient class, \$230,000 -- \$230,348.37.

17           And for the physician class, \$99,274.34. The  
18 estimated future costs are a total of \$189,131.87, broken down  
19 for the patient class as \$156,104.23.

20           For the physician class, as \$33,027.64. So what that  
21 results in, Your Honor, is a total estimated administration  
22 cost for both classes of \$518,754.58, broken down as for the  
23 patient class, \$386,452.60.

24           For the physician class, \$132,301 --

25           **THE COURT:** Slow down with the numbers.

1           **MR. SPAUGH:**   \$132,301.98.

2           **THE COURT:**   I mean, a fairly expensive  
3 administration, in my experience.

4           **MR. SPAUGH:**   I think that is fair, Your Honor.   I  
5 note the discrepancy between the patient and physician class,  
6 and I think that's warranted and reasonable here, given that  
7 the size of the patient class is massive.

8           **THE COURT:**   Right.   All of that was done -- all of  
9 the patient notice was via email?

10          **MR. SPAUGH:**   That's correct, Your Honor.

11          **THE COURT:**   It wasn't like there were first class  
12 mailing costs or even postcards.

13          **MR. SPAUGH:**   No.   There were 492 mailings.

14          **THE COURT:**   So it would have been data management of  
15 the transfer -- well, I guess Ms. Martin can speak, but from  
16 the defendant to the settlement administrator and converting  
17 that.

18          **MR. SPAUGH:**   Right.   I think that's why the  
19 settlement administrator -- I think if you were to ask them,  
20 they were a little frustrated in the way in which some of the  
21 information was conveyed to them by the defendant ECL, who had  
22 the records.

23          **THE COURT:**   I've been dealing with data from the  
24 receivership for a while and in various contexts, and Mr.  
25 Nelson and his partners and others who have been telling me for

1 awhile about those difficulties, so you don't have to explain  
2 any further.

3           **MR. SPAUGH:** Right. I do think that's the  
4 explanation for why there is so many costs already to date,  
5 when they haven't actually started cutting the checks process.

6           **THE COURT:** Because they are going to have to mail  
7 those.

8           **MR. SPAUGH:** Right. But it is because they had a lot  
9 of data that they had to comb through to identify the class  
10 members and the valid addresses and there was a lot of work  
11 involved in that process.

12           For the patient class as well on the future costs,  
13 Ms. Martin can speak to that more so, but there is going to be  
14 a more verification process involved and out-of-pocket cost  
15 determination, whereas for the physician class it is just you  
16 divide it up and everybody gets an equal amount.

17           Let me see if there are any other questions that you  
18 had. You also asked about money left from uncashed checks.  
19 All money will ultimately be distributed to the class, is my  
20 understanding.

21           **THE COURT:** So if there is uncashed checks, you just  
22 propose to send out a second round of checks to the people who  
23 did cash them?

24           **MR. SPAUGH:** I think we can work through that. I  
25 refer to Ms. Martin on that specific issue.

1           **MS. MARTIN:** Yes, Your Honor. What we've done in  
2 other settlements is, if there is enough after uncashed  
3 checks -- there is a pot. If there is at least a five dollar  
4 amount per person, then it makes sense to do another  
5 distribution. The settlement administrator works with us to  
6 make that determination as to, like, you know, where is our net  
7 zero dollar, where it makes sense.

8           If we have monies that are de minimis and so not  
9 worth trying to go another round of distribution, then I think  
10 what we would ask is to come back to the Court with a cy pres  
11 recommendation for the Court's approval, but particularly on  
12 the patient settlement class side, since one of the claims,  
13 which has been the majority that people have requested at this  
14 time, is a pro rata share of the fund.

15           We expect there to be minimal left in the fund,  
16 particularly since people have to claim-in for that. We expect  
17 that if they are going through the effort of making that claim,  
18 that they are going to go through the effort of cashing that  
19 check, and a lot of them will -- I mean, the class has the  
20 option to request digital payment, which has become quite  
21 prevalent.

22           **THE COURT:** Saves a lot of money.

23           **MS. MARTIN:** Saves a lot of money, but also in a  
24 consumer class, which is patient classes, individuals, it is  
25 very well-appreciated, because a lot of people do not have

1 banking relationships, or it is just harder to get a check  
2 cashed than to just have their money go directly into Venmo.  
3 So we do think that amount will be small, but we do expect that  
4 if it is beyond secondary distributions, that we would come  
5 back to the Court to ask for a cy pres distribution.

6 **THE COURT:** How many claims have you gotten?

7 **MS. MARTIN:** Currently, we have 8,904 claims, and of  
8 those, 178 are for out-of-pocket expenses. The remainder are  
9 for the pro rata share of the net settlement fund.

10 **THE COURT:** Okay.

11 **MS. MARTIN:** I know one of your questions is, you  
12 know, an estimate of what people will receive. If you take the  
13 178 claims, if they were all to be paid at the \$5,000 cap --

14 **THE COURT:** Which might or might not happen, but,  
15 yeah, it could.

16 **MS. MARTIN:** I think it is a good bet it is better  
17 than Vegas odds for us, but if all of those 178 claims were  
18 paid at \$5,000, then we would be looking at pro rata  
19 distribution to the remainder of the class at \$53.

20 In ordinary settlements, the trend is for the  
21 out-of-pocket expenses, typically about only 25 percent of  
22 those claims are deemed valid. If you use the 25 percent here  
23 and still pay those at the maximum \$5,000 amount, then we are  
24 looking at a distribution of \$127.62.

25 **THE COURT:** That's going to be part of the claim

1 administrator's job?

2           **MS. MARTIN:** That would be part of the claims  
3 administration's jobs. If none of those out-of-pocket claims  
4 were valid, and all of the 8,904 claims were adjudicated as the  
5 pro rata distribution, we would be looking at a distribution of  
6 \$151.97 per person. So again, we're looking at some range  
7 between \$53 and \$151 for the class, just based on current  
8 claims amount, but that's a good estimate for us today.

9           **THE COURT:** Okay. Great. Thank you.

10           **MR. SPAUGH:** The last note that I have collectively  
11 and on behalf of the physician settlement class is, just to  
12 confirm that we checked with the settlement administrator, and  
13 since the objection deadline, there have been no late  
14 submissions or any objections, so as of today, since the notice  
15 process began in November, there have been no objections to the  
16 proposed settlement.

17           I think the final question Your Honor had was how  
18 many of the email notices to patient settlement class members  
19 bounce-back, and I'll leave that to Ms. Martin.

20           **THE COURT:** Okay.

21           **MS. MARTIN:** Yes, Your Honor. So of the six million  
22 emails that went out, 16 percent were deemed invalid,  
23 undeliverable or bounced back, and so that meant that we had an  
24 84 percent direct notice reach.

25           **THE COURT:** That's pretty good.



1           **MS. MARTIN:** And then we supplemented with digital  
2 notice, and with the digital notice supplement it is estimated  
3 that the reach rate was at least 93 percent overall, but we  
4 have 84 direct notice and we were very pleased with that  
5 amount.

6           **THE COURT:** That's pretty good. Okay. Let's see.  
7 Hold on. Let me just look through my questions.

8           The expenses incurred, which were primarily mediation  
9 fee associated -- the patient settlement class motion, I think,  
10 said you requested attorneys' fees of one-third, and you gave  
11 an amount, whatever it was, inclusive of the expenses. So you  
12 are not asking for a separate award of the expenses?

13           **MS. MARTIN:** Correct, Your Honor. I think you kindly  
14 helped facilitate us using Judge Auld as mediator, and that  
15 kept expenses down.

16           Also, because we went into the bankruptcy and were  
17 able to secure a seat on the unsecured creditor's committee, we  
18 did not have the expense of bankruptcy counsel.

19           We were fortunate, due to a relationship that my firm  
20 has, we had outside bankruptcy counsel who assisted us in this  
21 matter for no fee, just trying to help us with the class to  
22 give us some extra guidance, and we think with both the  
23 physician class and the patient class having seats on the  
24 unsecured creditors committee and having external forces, that  
25 facilitated us to move so quickly to get the stay lifted.

1           That's a long way to say, Your Honor, that, yes, the  
2 expenses, we are not asking for additional expenses, again,  
3 because we understand that this is a limited fund and we want  
4 enough to go to the class.

5           **THE COURT:** I can't remember -- I didn't write down  
6 what the physician class is requesting about expenses.

7           **MR. SPAUGH:** Yes, Your Honor. The amount we  
8 requested in expenses is \$4,102.97, and that is on top of the  
9 requested 33 percent of the physician settlement.

10          **THE COURT:** You-all's lodestar multiplier is lower  
11 than the patient class. You are going to be lucky to come out  
12 even. I'm not sure you are going to come out even, based on  
13 what -- I don't think you gave me your actual hourly rate. You  
14 only gave me your effective hourly rate in your motion. My  
15 guess is, that that's lower than your actual hourly rate for  
16 most of your lawyers.

17          **MR. SPAUGH:** I can't be certain, but I think it is  
18 similar, but it is not that big of a discrepancy. But, yes, we  
19 are nearing the breakeven point.

20          **THE COURT:** Near the breakeven point. That's what I  
21 was guessing. All right.

22                 What does ECL want to tell me?

23          **MR. NELSON:** I think we've answered all of the  
24 questions. I'm happy to answer anything else that the Court  
25 has, but I understood that all of the questions had been

1 answered.

2           **THE COURT:** I think so. And I guess your client is  
3 still all tied up with Colorado Bankers Life Insurance, amongst  
4 others.

5           **MR. NELSON:** As Your Honor pointed out, there is  
6 still a lot of litigation happening in lots of places.

7           **THE COURT:** Yes, in lots of places. Does ECL have  
8 other -- I mean, I guess that is all taken care of in the  
9 bankruptcy.

10          **MR. NELSON:** Yes, in the bankruptcy.

11          **THE COURT:** So I don't have to worry about any of  
12 that.

13          **MR. NELSON:** Correct.

14          **THE COURT:** Correct. Thank you.

15               So I think my only real issue, and I just want to  
16 talk about the two insurance policies that have been assigned  
17 to the physician class. So what I think I would ask -- what I  
18 would want to do, subject to you all telling me there is a  
19 better way, just to be sure I'm meeting my fiduciary  
20 obligations to the class, would be to require you to come back  
21 and tell me about any settlement that you propose to reach with  
22 either of those two insurance companies, and I would, of  
23 course, try to keep your expenses down. I mean, I just want  
24 you -- I basically just want you to tell me a little about it,  
25 and then if I had some question or concern, you know, we could

1 go into it a little bit further, but I think I probably have a  
2 fiduciary obligation to your class to be sure that any  
3 settlement reached with those insurance companies is fair and  
4 reasonable.

5           **MR. SPAUGH:** That sounds good, Your Honor. So to  
6 confirm, we still anticipate that there will be a judgment in  
7 this action --

8           **THE COURT:** Yes. Absolutely.

9           **MR. SPAUGH:** -- and the Court will retain  
10 jurisdiction for purposes of enforcing the settlement  
11 agreement, and that's where we come in.

12           **THE COURT:** Yes. This would be final as to your  
13 agreement. You know, if down the road -- now if you get a  
14 verdict against them, I think it happens automatically because  
15 of what I would be approving, it says you get a third, and the  
16 class members get pro rata, and there is really nothing -- I  
17 mean, it is not a settlement, so I don't have to approve it.  
18 But if it is a settlement, that would be the part where I would  
19 just want you to come back and run it by me.

20           **MR. FERGUSON:** Your Honor, it is my understanding --  
21 and there is a lot of unknowns there, that if it did end up  
22 being in Indiana, or some other delightful place, we could come  
23 and seek relief from that order?

24           **THE COURT:** Absolutely. I'm not going to be a jerk  
25 about it. I just got a little uncomfortable at no court

1 oversight of that. I'm positive counsel and these class  
2 representatives seem to have been very, very responsible. You  
3 know, I'm sure you all would do something reasonable, I just  
4 think I'm supposed to look at it to confirm that. I don't  
5 really have any doubts. You all aren't going to sell them out.  
6 You know, you're motivated to get as much money as you can, and  
7 I appreciate that.

8 I'm sure you also want to get some money, and I don't  
9 know anything about the insurance policy. When I was in state  
10 court, I had a rule about reading appellate decisions if there  
11 was an uninsured or underinsured motorist coverage case, I did  
12 not read it, because they were so awful. I don't really have  
13 that same view about insurance policies in general, but not my  
14 favorite thing. That's okay. Get them all the time. All  
15 right.

16 Well, I think with that, you know, just so long as  
17 that is clear, I'm not going to have any problem with this.  
18 Now I'm going to try to get this order out quickly, but I'm  
19 going on vacation Thursday, and I'm going to be gone two weeks,  
20 and I just don't know for sure if I'm going to get it out  
21 before I leave. I'm going to try. It is, like, I don't know,  
22 thirty some odd pages long because, you know, this is by far  
23 the most complex class action settlement I have seen, and I've  
24 done, I don't know, ten of them, maybe in the last six or seven  
25 years. I'm just guessing. I don't really know. Maybe more.

1           This one pretty complicated, and I know it is the  
2 first no opt-out one that I've seen, but I definitely think it  
3 is fair and very reasonable and benefits the class. They get  
4 everything they could have gotten, really, and more than if you  
5 had litigated it, so that all looks fine.

6           Attorneys' fees, I had no problem with. That seemed  
7 very reasonable and in line. I just approved another one last  
8 week, so I recently looked at hourly rates for the lodestar  
9 comparison and, you know, had no problems with any of that and  
10 just everything about this has been complicated for you-all,  
11 and for me, which is why the order is going to be so long,  
12 because I think I have to explain it all.

13           The Fourth Circuit likes it when I explain. I don't  
14 think anybody is going to appeal but, you know, you just never  
15 know what is going to happen, and I want the record to reflect  
16 the careful consideration I have given it, because I have spent  
17 a lot of time with it, being sure I understand it. It looks  
18 entirely appropriate to me, and all of the requirements of Rule  
19 23 are met.

20           The notice meets the due process standard, and I will  
21 enter more detailed factual findings in the order.

22           Anybody have anything else they want to tell me?

23           **MS. MARTIN:** Yes, Ma'am, just two quick points.  
24 Number one, I think on behalf of all of us, I want to say thank  
25 you for the questions. I understand -- I know that's your

1 normal practice, and it does really help us as practitioners.  
2 We get so bogged down and we look at certain details, but it is  
3 always helpful when the court let's us know ahead of time  
4 certain details that we need to make sure, so thank you for  
5 that.

6           Number two, I would be remiss if I didn't say on the  
7 record, that although all of us sitting here came in  
8 adversarial representing our parties, you know, being advocates  
9 for our clients. When the settlement was reached, we all had  
10 one goal in trying to get it finalized and to get payment to  
11 the class members, and particularly with the difficulty of the  
12 interceding bankruptcy.

13           Again, I would be remiss if I didn't just say that I  
14 appreciate the professionalism that we've had from Womble, Bond  
15 and from Fox, Rothchild, all of us working together trying to  
16 be one voice, trying to be on the same side trying to get this  
17 through, and that's greatly appreciated.

18           It is not always seen, but it is greatly appreciated  
19 here through this complex matter and difficulty, and it went as  
20 smoothly as it did because of the professionalism that we had,  
21 again, every one being zealous advocates for their clients, but  
22 recognizing what the settlement that we had one goal, and I  
23 just wanted to acknowledge that.

24           **THE COURT:** Thank you, Ms. Martin.

25           **MR. SPAUGH:** I'll echo Ms. Martin's comments, and

1 appreciate the Court's vision in enabling the physician  
2 settlement class, which was in front of another judge, to come  
3 and participate in the ordered judicial settlement conference,  
4 and the consolidation, which enabled us to reach this complex  
5 class action settlement, and also to Fox, Rothchild for not  
6 wasting the entire insurance policy before we got here.

7 **THE COURT:** Anything to add, Mr. Nelson?

8 **MR. NELSON:** No, Your Honor.

9 **THE COURT:** I think you all have done a great job, in  
10 case I haven't made that clear. You went into it early trying  
11 to settle it, and it was pretty complicated, so I'm going to  
12 try to do my part to -- I've tried to move it along as quickly  
13 as I can at every stage, and if I can get it out before I go  
14 away for a couple of weeks, I will. Otherwise, you'll get it  
15 mid July. I know you would like it as soon as possible, and I,  
16 too, would like it gone as soon as possible. I'll get that out  
17 to you as quickly as I can.

18 I appreciate you-all's professionalism and  
19 collegiality and flexibility with me about scheduling things.

20 **MR. SPAUGH:** I do have one final matter. Did the  
21 Court need a supplemental declaration?

22 **THE COURT:** No, I don't think so. You-all got the  
23 numbers from the settlement administrator and you reported them  
24 to me.

25 When I first started doing these settlements, I



1 approved the administration fees. In the last three or four,  
2 it has been not done that way, you know, they've been basically  
3 approved by counsel. I always like to ask them about, and I've  
4 now seen, you know, a lot of them, so I don't think I need  
5 those details.

6 I'll probably just say something in the order like  
7 you reported on them to me and they were reasonable. So  
8 somebody can pay for a transcript if they want to know more.  
9 Okay.

10 Anything else? Thank you. Court is adjourned.  
11 (Court adjourned at 10:50 a.m.)  
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C E R T I F I C A T E

I, J. ALLEN, RPR, United States District Court Reporter  
for the Middle District of North Carolina, DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of  
the proceedings had in the above-entitled matter.

June 27, 2024

*J-ALLEN*

J. Allen, RPR  
United States Court Reporter  
324 W. Market Street  
Greensboro, NC 27401

<p><b>MR. FERGUSON:</b> [2] 3/14 28/20  <b>MR. NELSON:</b> [6] 3/21 26/23 27/5 27/10 27/13 32/8  <b>MR. SPAUGH:</b> [41]  <b>MS. MARTIN:</b> [11] 3/10 22/1 22/23 23/7 23/11 23/16 24/2 24/21 25/1 25/13 30/23  <b>MS. WHITE:</b> [1] 3/8  <b>THE COURT:</b> [61]</p>	<p><b>6</b>  <b>6033</b> [1] 1/22</p>
<p><b>\$</b>  <b>\$1,460,449.50</b> [1] 18/25  <b>\$127.62</b> [1] 23/24  <b>\$132,301</b> [1] 19/24  <b>\$132,301.98</b> [1] 20/1  <b>\$151</b> [1] 24/7  <b>\$151.97</b> [1] 24/6  <b>\$156,104.23</b> [1] 19/19  <b>\$189,131.87</b> [1] 19/18  <b>\$230,000</b> [1] 19/16  <b>\$230,348.37</b> [1] 19/16  <b>\$3,252.40</b> [1] 19/5  <b>\$329,622.71</b> [1] 19/15  <b>\$33,027.64</b> [1] 19/20  <b>\$386,452.60</b> [1] 19/23  <b>\$4,102.97</b> [1] 26/8  <b>\$400,000</b> [1] 6/19  <b>\$5,000</b> [3] 23/13 23/18 23/23  <b>\$518,754.58</b> [1] 19/22  <b>\$53</b> [2] 23/19 24/7  <b>\$647,228.05</b> [1] 19/4  <b>\$99,274.34</b> [1] 19/17</p>	<p><b>8</b>  <b>8,904</b> [2] 23/7 24/4  <b>84</b> [2] 24/24 25/4</p>
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Aside [1] 15/25	biggest [2] 2/14 3/3
ask [6] 6/15 20/19 22/10 23/5 27/17 33/3	billing [1] 14/17
asked [3] 4/4 4/19 21/18	bit [4] 4/12 11/2 13/14 28/1
asking [2] 25/12 26/2	bogged [1] 31/2
assets [4] 13/16 16/25 17/23 17/23	Bond [4] 1/19 3/15 4/17 31/14
assigned [5] 4/25 5/17 6/22 15/17 27/16	books [1] 15/8
assignment [4] 8/25 9/11 11/18 14/13	both [5] 8/25 9/1 16/10 19/22 25/22
assisted [1] 25/20	bounce [1] 24/19
associated [1] 25/9	bounce-back [1] 24/19
assume [2] 7/6 13/21	bounced [1] 24/23
at [30] 2/2 3/2 4/6 7/5 7/19 8/2 11/15 12/23 14/15 14/18 15/14 17/1 19/12 22/3 22/13 23/13 23/18 23/18 23/19 23/23 23/24 24/5 24/6 25/3 28/25 29/4 30/8 31/2 32/13 33/11	breakeven [2] 26/19 26/20
attachments [1] 15/11	broken [3] 19/15 19/18 19/22
attend [1] 15/19	bunch [1] 2/5
attended [2] 11/20 11/21	

<b>B</b>	
busy [1]	3/23
but [47]	
buyer [5]	13/12 13/13 13/15 15/10 16/12
<b>C</b>	
calculate [1]	18/13
call [1]	8/7
came [1]	31/7
can [15]	4/14 5/2 6/5 10/19 13/3 18/11 18/15 20/15 21/13 21/24 29/6 32/13 32/13 32/17 33/8
can't [2]	26/5 26/17
cap [1]	23/13
care [5]	1/7 2/4 12/6 16/11 27/8
careful [1]	30/16
CAROLINA [6]	1/1 1/6 12/10 16/21 17/3 34/4
case [4]	1/3 2/4 29/11 32/10
cases [1]	8/23
cash [1]	21/23
cashied [1]	23/2
cashing [1]	22/18
CATHERINE [1]	1/11
cause [1]	2/10
caution [1]	7/10
certain [4]	17/21 26/17 31/2 31/4
certified [1]	2/17
CERTIFY [1]	34/4
Chapter [1]	13/16
check [3]	8/7 22/19 23/1
checked [1]	24/12
checks [5]	21/5 21/18 21/21 21/22 22/3
CHIEF [1]	1/12
Circuit [1]	30/13
circumstances [1]	7/2
Civil [1]	1/3
claim [9]	6/11 8/24 14/12 18/16 19/5 19/6 22/16 22/17 23/25
claim-in [1]	22/16
claims [23]	2/15 5/7 5/10 5/14 13/23 14/1 14/4 18/15 18/18 18/21 18/22 18/24 19/4 22/12 23/6 23/7 23/13 23/17 23/22 24/2 24/3 24/4 24/8
class [84]	
classes [7]	2/13 5/14 8/24 12/20 16/10 19/22 22/24
classes' [1]	13/10
clear [6]	8/20 11/2 13/17 17/24 29/17 32/10
client [2]	8/24 27/2
clients [2]	31/9 31/21
colleague [1]	15/18
collectively [2]	9/18 24/10
collegiality [1]	32/19
Colorado [4]	4/21 13/13 16/18 27/3
comb [1]	21/9
come [10]	12/5 22/10 23/4 26/11 26/12 27/20 28/11 28/19 28/22 32/2
comes [1]	5/16
coming [4]	4/24 7/21 9/16 16/8
comments [1]	31/25
committee [3]	13/6 25/17 25/24
companies [4]	2/16 2/19 27/22 28/3
company [2]	8/25 10/7
comparison [1]	30/9
complex [3]	29/23 31/19 32/4
complicated [3]	30/1 30/10 32/11
components [1]	15/25
computer [1]	1/25
computer-aided [1]	1/25
concern [2]	4/23 27/25
conference [1]	32/3
conferred [1]	19/10
confidence [1]	9/23
confirm [3]	24/12 28/6 29/4
consideration [1]	30/16
consolidated [1]	2/5
consolidation [1]	32/4
consumer [1]	22/24
contested [1]	15/20
context [2]	8/4 12/20
contexts [1]	20/24
contract [2]	14/14 15/2
contracts [5]	14/16 15/11 15/15 15/16 15/23
contractual [1]	15/3
converting [1]	20/16
conveyed [1]	20/21
correct [10]	6/3 9/12 10/2 11/6 18/4 20/10 25/13 27/13 27/14 34/5
correctly [1]	2/13
cost [4]	19/9 19/14 19/22 21/14
costs [4]	19/18 20/12 21/4 21/12
could [11]	9/14 11/3 12/5 12/6 17/8 17/17 18/17 23/15 27/25 28/22 30/4
counsel [6]	4/14 11/11 25/18 25/20 29/1 33/3
count [1]	17/8
couple [2]	2/9 32/14
course [4]	2/25 14/3 14/21 27/23
court [44]	
Court's [7]	7/9 11/20 11/21 14/2 19/12 22/11 32/1
cover [1]	10/23
coverage [6]	5/12 5/13 5/14 6/18 8/23 29/11
creditor's [1]	25/17
creditors [5]	13/6 13/11 17/22 18/5 25/24
credits [2]	15/3 15/15
cross [1]	15/20
cross-examine [1]	15/20
current [1]	24/7
Currently [1]	23/7
cut [1]	14/6
cutting [1]	21/5
cy [2]	22/10 23/5
<b>D</b>	
Dallas [1]	15/19
data [3]	20/14 20/23 21/9
date [9]	13/23 14/1 14/6 18/16 18/24 19/5 19/9 19/14 21/4
de [1]	22/8
deadline [2]	18/16 24/13
dealing [1]	20/23
decide [1]	10/6
decision [2]	10/9 11/7
decisions [1]	29/10
declaration [3]	18/20 19/12 32/21
declaratory [2]	8/9 12/11
deduct [1]	19/3
deductions [1]	17/21
deemed [2]	23/22 24/22
defend [1]	8/18
defendant [8]	1/8 1/20 5/20 5/23 6/2 6/22 20/16 20/21
defendant's [3]	5/13 16/25 17/23

<b>D</b>	
<p> <b>defendants</b> [7] 3/20 5/8 7/13 7/15 11/6 12/12 15/14  <b>definitely</b> [1] 30/2  <b>delay</b> [1] 16/1  <b>delightful</b> [1] 28/22  <b>denied</b> [1] 6/18  <b>denying</b> [1] 14/7  <b>detail</b> [1] 4/10  <b>detailed</b> [2] 4/4 30/21  <b>details</b> [3] 31/2 31/4 33/5  <b>determination</b> [3] 13/24 21/15 22/6  <b>determines</b> [1] 10/12  <b>Dickinson</b> [3] 1/19 3/15 4/18  <b>did</b> [11] 2/8 2/11 12/22 13/1 15/9 21/23 25/18 28/21 29/11 31/20 32/20  <b>didn't</b> [8] 6/15 6/24 10/25 11/3 11/5 26/5 31/6 31/13  <b>different</b> [1] 9/14  <b>difficulties</b> [1] 21/1  <b>difficulty</b> [2] 31/11 31/19  <b>digital</b> [3] 22/20 25/1 25/2  <b>direct</b> [3] 10/20 24/24 25/4  <b>directly</b> [3] 3/25 6/16 23/2  <b>discrepancy</b> [2] 20/5 26/18  <b>dismissed</b> [1] 8/10  <b>dispute</b> [8] 5/12 5/13 5/14 5/22 5/22 8/6 8/12 14/21  <b>disputes</b> [1] 14/15  <b>distributed</b> [2] 7/11 21/19  <b>distribution</b> [7] 22/5 22/9 23/5 23/19 23/24 24/5 24/5  <b>distributions</b> [2] 10/15 23/4  <b>DISTRICT</b> [6] 1/1 1/1 1/12 12/2 34/3 34/4  <b>divide</b> [2] 19/4 21/16  <b>divided</b> [2] 4/8 8/19  <b>DJ</b> [1] 8/18  <b>do</b> [27] 2/17 2/18 4/2 5/2 5/3 7/8 7/9 7/16 8/13 9/15 11/14 11/24 12/10 13/16 13/17 14/11 17/15 21/3 22/4 22/25 23/3 23/3 27/18 29/3 32/12 32/20 34/4  <b>does</b> [7] 3/25 5/1 5/5 8/3 26/22 27/7 31/1  <b>doesn't</b> [5] 5/14 6/22 9/1 14/10 15/16  <b>doing</b> [4] 7/19 9/4 9/4 32/25  <b>dollar</b> [2] 22/3 22/7  <b>dollars</b> [4] 6/17 17/19 17/22 18/1  <b>don't</b> [25] 2/10 3/2 4/2 6/5 8/22 11/1 11/25 14/4 15/14 15/15 17/16 21/1 26/13 27/11 28/17 29/4 29/8 29/12 29/20 29/21 29/24 29/25 30/13 32/22 33/4  <b>done</b> [5] 20/8 22/1 29/24 32/9 33/2  <b>done -- all</b> [1] 20/8  <b>doubts</b> [1] 29/5  <b>down</b> [11] 13/8 14/19 15/19 19/18 19/22 19/25 25/15 26/5 27/23 28/13 31/2  <b>drafted</b> [1] 7/25  <b>dream</b> [2] 6/12 6/13  <b>due</b> [2] 25/19 30/20  <b>Durham</b> [1] 12/13 </p>	<p> <b>efficient</b> [1] 9/19  <b>effort</b> [2] 22/17 22/18  <b>efforts</b> [1] 15/21  <b>either</b> [2] 10/13 27/22  <b>else</b> [9] 3/1 3/1 3/4 4/1 4/10 4/15 26/24 30/22 33/10  <b>email</b> [2] 20/9 24/18  <b>emails</b> [2] 2/9 24/22  <b>enabled</b> [1] 32/4  <b>enabling</b> [1] 32/1  <b>end</b> [2] 12/7 28/21  <b>ended</b> [1] 17/13  <b>enforced</b> [1] 16/16  <b>enforcing</b> [1] 28/10  <b>engaged</b> [1] 11/18  <b>enough</b> [3] 6/10 22/2 26/4  <b>enter</b> [2] 9/23 30/21  <b>entered</b> [2] 15/2 17/4  <b>entire</b> [2] 14/20 32/6  <b>entirely</b> [1] 30/18  <b>entities</b> [2] 16/20 16/22  <b>entitled</b> [2] 7/5 34/6  <b>entrusting</b> [1] 10/7  <b>equal</b> [1] 21/16  <b>equally</b> [2] 4/8 8/20  <b>equitably</b> [1] 4/8  <b>ESQ</b> [5] 1/14 1/16 1/18 1/18 1/20  <b>essentially</b> [3] 13/15 15/12 16/25  <b>estimate</b> [2] 23/12 24/8  <b>estimated</b> [3] 19/18 19/21 25/2  <b>even</b> [5] 7/5 8/2 20/12 26/12 26/12  <b>every</b> [5] 3/24 9/23 16/14 31/21 32/13  <b>everybody</b> [2] 3/5 21/16  <b>everything</b> [6] 3/4 4/3 4/10 4/12 30/4 30/10  <b>evidentiary</b> [1] 15/20  <b>Exactly</b> [2] 12/24 17/12  <b>examine</b> [1] 15/20  <b>examining</b> [1] 2/11  <b>example</b> [2] 6/6 12/25  <b>exceed</b> [1] 17/23  <b>except</b> [1] 15/14  <b>excluding</b> [1] 17/1  <b>expect</b> [5] 2/10 18/12 22/15 22/16 23/3  <b>expectation</b> [1] 11/15  <b>expected</b> [1] 17/19  <b>expense</b> [1] 25/18  <b>expenses</b> [14] 19/1 19/2 19/3 23/8 23/21 25/8 25/11 25/12 25/15 26/2 26/2 26/6 26/8 27/23  <b>expensive</b> [1] 20/2  <b>experience</b> [1] 20/3  <b>explain</b> [4] 2/21 21/1 30/12 30/13  <b>explanation</b> [1] 21/4  <b>extended</b> [1] 13/24  <b>extent</b> [5] 5/12 7/23 9/7 14/9 15/1  <b>external</b> [1] 25/24  <b>extra</b> [1] 25/22  <b>EYE</b> [2] 1/7 2/3 </p>
<b>E</b>	<b>F</b>
<p> <b>each</b> [2] 18/11 19/5  <b>EAGLES</b> [1] 1/11  <b>early</b> [1] 32/10  <b>echo</b> [1] 31/25  <b>ECL</b> [13] 5/7 5/17 7/14 8/8 8/11 8/17 12/21 14/16 15/7 18/1 20/21 26/22 27/7  <b>ECL's</b> [1] 17/22  <b>effective</b> [2] 11/19 26/14 </p>	<p> <b>facilitate</b> [1] 25/14  <b>facilitated</b> [1] 25/25  <b>fact</b> [1] 10/20  <b>factual</b> [1] 30/21  <b>fair</b> [12] 4/11 5/4 7/18 9/2 9/6 9/8 9/10 10/11 10/12 20/4 28/3 30/3  <b>fairly</b> [3] 11/3 18/15 20/2  <b>fairness</b> [1] 10/19 </p>

<b>F</b> <b>familiar</b> [1] 7/1 <b>far</b> [2] 17/23 29/22 <b>FARLEY</b> [2] 1/3 2/3 <b>fashion</b> [1] 14/8 <b>favorite</b> [1] 29/14 <b>fee</b> [4] 2/20 7/3 25/9 25/21 <b>fees</b> [10] 2/19 4/24 5/2 6/15 7/1 7/12 19/1 25/10 30/6 33/1 <b>FERGUSON</b> [2] 1/18 3/15 <b>few</b> [1] 9/14 <b>fiduciary</b> [3] 2/12 27/19 28/2 <b>fight</b> [1] 13/22 <b>file</b> [2] 2/25 14/12 <b>filed</b> [3] 8/9 12/11 12/21 <b>final</b> [9] 1/11 2/6 13/20 13/25 14/5 14/10 24/17 28/12 32/20 <b>finalized</b> [1] 31/10 <b>find</b> [1] 12/22 <b>findings</b> [1] 30/21 <b>fine</b> [3] 8/19 10/13 30/5 <b>firm</b> [2] 3/8 25/19 <b>first</b> [5] 5/5 11/4 20/11 30/2 32/25 <b>five</b> [1] 22/3 <b>flew</b> [1] 15/19 <b>flexibility</b> [1] 32/19 <b>folks</b> [1] 2/24 <b>forces</b> [1] 25/24 <b>foregoing</b> [1] 34/5 <b>fortunate</b> [1] 25/19 <b>fought</b> [2] 11/17 11/24 <b>four</b> [1] 33/1 <b>Fourth</b> [1] 30/13 <b>Fox</b> [4] 1/20 3/21 31/15 32/5 <b>frankly</b> [2] 10/13 16/1 <b>free</b> [1] 13/17 <b>front</b> [1] 32/2 <b>frustrated</b> [1] 20/20 <b>full</b> [1] 16/12 <b>fully</b> [3] 2/11 16/15 17/6 <b>fund</b> [8] 7/18 9/5 14/25 18/25 22/14 22/15 23/9 26/3 <b>funds</b> [1] 12/23 <b>funny</b> [1] 7/2 <b>further</b> [4] 10/22 12/22 21/2 28/1 <b>future</b> [4] 5/2 6/10 19/18 21/12	<b>gone</b> [3] 7/14 29/19 32/16 <b>good</b> [9] 3/10 3/14 3/18 3/19 23/16 24/8 24/25 25/6 28/5 <b>gosh</b> [1] 9/20 <b>got</b> [12] 2/21 3/13 4/1 4/4 9/11 13/14 14/15 16/11 18/23 28/25 32/6 32/22 <b>gotten</b> [2] 23/6 30/4 <b>grant</b> [2] 13/25 14/10 <b>granted</b> [1] 13/20 <b>great</b> [2] 24/9 32/9 <b>greatly</b> [2] 31/17 31/18 <b>Greensboro</b> [2] 1/6 34/12 <b>Greg</b> [1] 16/22 <b>guess</b> [5] 6/14 20/15 26/15 27/2 27/8 <b>guessing</b> [2] 26/21 29/25 <b>guidance</b> [1] 25/22
<b>G</b> <b>gallery</b> [1] 11/23 <b>gave</b> [3] 25/10 26/13 26/14 <b>general</b> [2] 10/19 29/13 <b>get</b> [26] 2/23 3/5 7/4 8/15 14/25 15/11 17/9 18/23 23/1 25/25 28/13 28/15 28/16 29/6 29/8 29/14 29/18 29/20 30/3 31/2 31/10 31/10 31/16 32/13 32/14 32/16 <b>gets</b> [1] 21/16 <b>getting</b> [5] 4/7 6/4 9/16 16/1 17/6 <b>ghost</b> [1] 12/4 <b>give</b> [2] 12/4 25/22 <b>given</b> [3] 7/17 20/6 30/16 <b>gives</b> [1] 14/20 <b>glitched</b> [1] 6/5 <b>globally</b> [1] 4/19 <b>go</b> [14] 4/18 7/4 7/10 8/13 12/14 14/14 17/15 18/2 22/9 22/18 23/2 26/4 28/1 32/13 <b>goal</b> [2] 31/10 31/22 <b>goes</b> [1] 8/18 <b>going</b> [38]	<b>H</b> <b>had</b> [25] 2/9 4/22 12/15 14/2 14/6 15/9 18/10 20/21 21/8 21/9 21/18 24/17 24/23 25/20 26/25 27/25 29/10 30/5 30/6 30/9 31/9 31/14 31/20 31/22 34/6 <b>handle</b> [2] 4/20 4/21 <b>handling</b> [1] 9/19 <b>happen</b> [3] 2/17 23/14 30/15 <b>happened</b> [2] 12/18 18/7 <b>happening</b> [2] 12/4 27/6 <b>happens</b> [2] 8/22 28/14 <b>happy</b> [3] 16/3 19/10 26/24 <b>hard</b> [2] 11/17 11/24 <b>harder</b> [1] 23/1 <b>has</b> [14] 2/12 3/16 5/17 10/21 10/24 15/7 16/4 22/13 22/19 22/20 25/20 26/25 30/10 33/2 <b>hasn't</b> [2] 13/20 18/7 <b>have</b> [77] <b>haven't</b> [2] 21/5 32/10 <b>having</b> [2] 25/23 25/24 <b>he</b> [1] 15/19 <b>hearing</b> [3] 4/24 11/21 11/22 <b>hearings</b> [1] 15/20 <b>held</b> [2] 10/16 10/17 <b>help</b> [3] 19/12 25/21 31/1 <b>helped</b> [1] 25/14 <b>helpful</b> [2] 12/17 31/3 <b>here</b> [20] 2/3 3/7 3/15 3/16 3/20 7/10 7/17 7/21 8/5 9/4 10/3 11/2 11/23 12/23 17/1 20/6 23/22 31/7 31/19 32/6 <b>HEREBY</b> [1] 34/4 <b>herself</b> [1] 1/3 <b>him</b> [1] 4/1 <b>his</b> [4] 3/25 15/21 16/22 20/25 <b>Hold</b> [2] 3/12 25/7 <b>holder</b> [1] 5/19 <b>HOLDINGS</b> [1] 1/7 <b>holds</b> [1] 6/21 <b>Honor</b> [24] 3/10 3/14 3/18 3/21 5/5 6/3 7/16 9/3 12/15 16/13 17/16 19/21 20/4 20/10 22/1 24/17 24/21 25/13 26/1 26/7 27/5 28/5 28/20 32/8 <b>HONORABLE</b> [1] 1/11 <b>honored</b> [1] 16/14 <b>hope</b> [2] 2/6 14/10 <b>hopefully</b> [1] 4/14 <b>hourly</b> [4] 26/13 26/14 26/15 30/8 <b>how</b> [6] 4/2 12/16 13/3 18/11 23/6 24/17 <b>however</b> [1] 19/10



<b>I</b>	
<b>I'm</b> [23] 3/16 6/4 6/20 7/1 8/16 11/22 19/13 26/12 26/24 27/19 28/24 29/1 29/3 29/4 29/8 29/17 29/18 29/18 29/19 29/20 29/21 29/25 32/11	<b>judgment</b> [4] 7/4 8/9 8/18 28/6 <b>judicial</b> [2] 17/18 32/3 <b>July</b> [2] 18/17 32/15 <b>July 24th</b> [1] 18/17 <b>June</b> [2] 1/6 34/9 <b>jurisdiction</b> [2] 5/3 28/10 <b>just</b> [44]
<b>I've</b> [10] 3/12 3/12 4/1 4/3 6/25 20/23 29/23 30/2 32/12 33/3	<b>K</b>
<b>idea</b> [4] 6/17 6/20 11/25 18/14	<b>keep</b> [1] 27/23 <b>keeping</b> [1] 3/23 <b>kept</b> [1] 25/15 <b>KIMBERLY</b> [1] 1/3 <b>kind</b> [7] 3/4 6/12 6/14 8/16 12/5 12/25 18/14 <b>kindly</b> [1] 25/13 <b>KIP</b> [2] 1/20 3/21 <b>know</b> [47] <b>know -- it</b> [1] 2/22
<b>identified</b> [3] 13/12 14/2 16/5	<b>L</b>
<b>identify</b> [1] 21/9	<b>language</b> [1] 15/22 <b>last</b> [6] 11/3 15/2 24/10 29/24 30/7 33/1 <b>late</b> [2] 11/3 24/13 <b>lawsuit</b> [1] 2/25 <b>lawsuits</b> [2] 8/15 16/22 <b>lawyers</b> [2] 10/8 26/16 <b>lead</b> [1] 2/4 <b>LEADERS</b> [2] 1/7 2/4 <b>least</b> [3] 3/25 22/3 25/3 <b>leave</b> [2] 24/19 29/21 <b>leaves</b> [1] 19/4 <b>left</b> [3] 15/13 21/18 22/15 <b>less</b> [2] 6/14 8/22 <b>let</b> [5] 4/20 4/21 4/23 21/17 25/7 <b>let's</b> [3] 6/16 25/6 31/3 <b>liens</b> [1] 17/22 <b>Life</b> [4] 4/22 13/13 16/19 27/3 <b>lifted</b> [1] 25/25 <b>like</b> [13] 4/6 4/12 5/3 6/12 10/9 12/7 20/11 22/6 29/21 32/15 32/16 33/3 33/6 <b>like -- this</b> [1] 4/6 <b>likely</b> [2] 8/21 17/18 <b>likes</b> [1] 30/13 <b>limited</b> [3] 7/18 12/23 26/3 <b>Lindberg</b> [2] 3/23 16/22 <b>line</b> [2] 10/22 30/7 <b>LISA</b> [2] 1/16 3/8 <b>litigated</b> [1] 30/5 <b>litigation</b> [2] 15/8 27/6 <b>little</b> [9] 4/12 6/4 7/2 11/2 13/14 20/20 27/24 28/1 28/25 <b>LLC</b> [1] 1/7 <b>LLP</b> [3] 1/16 1/19 1/20 <b>located</b> [1] 12/12 <b>lodestar</b> [2] 26/10 30/8 <b>long</b> [5] 11/1 26/1 29/16 29/22 30/11 <b>look</b> [5] 5/3 14/14 25/7 29/4 31/2 <b>looked</b> [1] 30/8 <b>looking</b> [4] 23/18 23/24 24/5 24/6 <b>looks</b> [5] 3/1 4/5 8/2 30/5 30/17 <b>lot</b> [10] 21/8 21/10 22/19 22/22 22/23 22/25 27/6 28/21 30/17 33/4 <b>lots</b> [2] 27/6 27/7 <b>lower</b> [2] 26/10 26/15 <b>lucky</b> [1] 26/11
<b>important</b> [2] 15/24 18/8	<b>M</b>
<b>in</b> [86]	<b>Ma'am</b> [1] 30/23
<b>incentivize</b> [1] 8/11	
<b>incentivizes</b> [1] 8/13	
<b>Inception</b> [1] 6/12	
<b>inclined</b> [1] 7/23	
<b>including</b> [1] 9/18	
<b>inclusive</b> [1] 25/11	
<b>increase</b> [1] 7/21	
<b>increasing</b> [1] 7/19	
<b>incredibly</b> [1] 4/4	
<b>incurred</b> [1] 25/8	
<b>Indiana</b> [3] 12/7 12/9 28/22	
<b>individuals</b> [1] 22/24	
<b>information</b> [4] 19/7 19/8 19/9 20/21	
<b>initially</b> [1] 14/1	
<b>ink</b> [1] 3/13	
<b>insurance</b> [25] 2/15 2/19 4/7 4/8 4/22 4/25 4/25 5/9 5/19 8/23 8/25 10/5 10/7 11/16 13/14 16/7 16/19 17/1 27/3 27/16 27/22 28/3 29/9 29/13 32/6	
<b>insure</b> [1] 13/23	
<b>insured</b> [3] 5/8 14/8 15/22	
<b>insureds</b> [3] 5/7 5/23 17/11	
<b>insurers</b> [4] 5/11 5/15 11/21 12/12	
<b>interceding</b> [1] 31/12	
<b>interest</b> [1] 13/10	
<b>interests</b> [1] 13/3	
<b>interviews</b> [1] 13/7	
<b>into</b> [8] 5/16 9/24 15/2 19/7 23/2 25/16 28/1 32/10	
<b>introduce</b> [1] 3/5	
<b>invalid</b> [1] 24/22	
<b>involved</b> [5] 2/23 13/6 16/14 21/11 21/14	
<b>involvement</b> [1] 16/19	
<b>involving</b> [1] 4/1	
<b>is</b> [153]	
<b>isn't</b> [2] 8/6 8/23	
<b>issue</b> [6] 5/1 12/23 14/18 17/1 21/25 27/15	
<b>issues</b> [1] 16/4	
<b>it</b> [122]	
<b>It's</b> [1] 15/16	
<b>its</b> [4] 5/7 5/17 13/18 15/8	
<b>J</b>	
<b>J-ALLEN</b> [1] 34/10	
<b>JEAN</b> [2] 1/14 3/10	
<b>jerk</b> [1] 28/24	
<b>job</b> [2] 24/1 32/9	
<b>jobs</b> [1] 24/3	
<b>judge</b> [6] 1/12 3/24 9/1 17/3 25/14 32/2	



<b>M</b>	
made [1]	32/10
mail [1]	21/6
mailing [1]	20/12
mailings [1]	20/13
maintain [1]	15/8
majority [1]	22/13
make [3]	17/9 22/6 31/4
makes [3]	9/10 22/4 22/7
making [4]	6/20 10/8 10/9 22/17
management [1]	20/14
many [3]	21/4 23/6 24/18
March [1]	18/23
Market [1]	34/12
MARTIN [8]	1/14 3/10 4/20 20/15 21/13 21/25 24/19 31/24
Martin's [1]	31/25
Mason [2]	1/16 3/8
massive [1]	20/7
matter [9]	2/6 9/17 9/19 14/2 15/16 25/21 31/19 32/20 34/6
maximum [1]	23/23
may [1]	9/20
maybe [12]	3/1 4/13 4/21 6/15 7/5 8/19 8/19 8/21 8/22 11/23 29/24 29/25
me [27]	2/21 2/22 3/5 4/5 4/11 4/15 4/16 4/23 5/1 11/1 12/5 20/25 21/17 25/7 26/13 26/14 26/22 27/18 27/21 27/24 28/19 30/11 30/18 30/22 32/19 32/24 33/7
mean [9]	2/20 3/24 6/1 17/10 20/2 22/19 27/8 27/23 28/17
means [1]	17/24
meant [1]	24/23
mediation [1]	25/8
mediator [1]	25/14
medical [1]	14/17
meeting [1]	27/19
meets [1]	30/20
member [2]	18/12 19/6
members [11]	4/9 7/25 9/6 10/15 14/9 18/2 18/8 21/10 24/18 28/16 31/11
memorandum [2]	16/23 16/24
mentioned [1]	8/4
mess [1]	16/7
met [1]	30/19
method [2]	8/5 10/4
mid [1]	32/15
MIDDLE [3]	1/1 12/2 34/4
midst [1]	17/6
might [6]	2/22 10/10 11/15 11/16 23/14 23/14
million [7]	6/17 17/19 17/20 17/21 17/25 19/3 24/21
mind [1]	13/19
minimal [1]	22/15
minimis [1]	22/8
minute [1]	11/1
money [14]	2/23 4/7 4/7 4/8 8/13 17/6 18/1 21/18 21/19 22/22 22/23 23/2 29/6 29/8
monies [1]	22/8
month [2]	18/19 18/19
moot [1]	12/6
more [8]	4/12 7/5 21/13 21/14 29/25 30/4 30/21 33/8
Morgan [4]	1/15 1/15 3/11 3/11
morning [4]	3/10 3/14 3/18 3/19
most [6]	7/19 8/15 9/18 18/21 26/16 29/23
motion [2]	25/9 26/14
motivated [1]	29/6
motorist [1]	29/11
move [2]	25/25 32/12
movie [1]	6/12
Mr [3]	4/21 20/24 32/7
Mr. [1]	3/23
Mr. Lindberg [1]	3/23
Ms [2]	4/20 21/25
Ms. [6]	2/8 20/15 21/13 24/19 31/24 31/25
Ms. Martin [4]	20/15 21/13 24/19 31/24
Ms. Martin's [1]	31/25
Ms. Winchester [1]	2/8
much [4]	3/12 4/5 18/11 29/6
multiple [2]	15/19 15/20
multiplier [1]	26/10
my [16]	2/8 2/14 3/13 4/15 4/18 16/6 20/3 21/19 25/7 25/19 26/14 27/15 27/19 28/20 29/13 32/12
<b>N</b>	
nature [1]	7/18
NC [1]	34/12
Near [1]	26/20
nearing [1]	26/19
necessarily [1]	9/8
need [4]	2/23 31/4 32/21 33/4
negotiating [1]	6/18
negotiation [1]	18/6
negotiations [1]	11/18
NELSON [5]	1/20 3/21 4/21 20/25 32/7
net [2]	22/6 23/9
never [1]	30/14
New [1]	15/19
next [7]	6/16 12/15 13/12 14/13 16/18 17/18 18/10
no [18]	1/3 5/5 6/16 6/20 9/22 10/21 15/13 18/13 20/13 24/13 24/15 25/21 28/25 30/2 30/6 30/9 32/8 32/22
noncash [1]	16/8
none [2]	15/11 24/3
nonmonetary [1]	15/5
normal [1]	31/1
NORTH [6]	1/1 1/6 12/10 16/20 17/3 34/4
not [45]	
note [4]	10/18 18/19 20/5 24/10
notes [2]	9/14 18/17
nothing [1]	28/16
nothing -- I [1]	28/16
notice [8]	17/18 20/9 24/14 24/24 25/2 25/2 25/4 30/20
notices [2]	10/20 24/18
November [1]	24/15
now [9]	4/16 5/2 8/24 10/20 14/23 18/1 28/13 29/18 33/4
number [6]	13/22 15/5 17/20 19/7 30/24 31/6
numbers [4]	6/20 19/13 19/25 32/23
<b>O</b>	
object [1]	15/9
objected [1]	10/21
objection [1]	24/13
objections [2]	24/14 24/15
obligation [2]	15/7 28/2
obligations [6]	2/12 5/25 6/1 13/18 13/21 27/20
obtain [1]	18/5
obtained [2]	12/19 13/5
obvious [1]	4/3

<b>O</b>	
odd [1]	29/22
odds [1]	23/17
off [1]	18/15
offer [1]	10/7
often [2]	8/22 8/22
oh [1]	9/20
okay [11]	2/3 3/9 6/16 16/17 18/9 23/10 24/9 24/20 25/6 29/14 33/9
on [40]	
once [1]	13/1
one [32]	2/20 3/13 3/24 4/14 8/9 8/17 8/19 8/25 10/18 10/21 11/21 11/23 12/11 13/5 13/23 15/18 16/14 16/19 16/21 17/16 22/12 23/11 25/10 30/1 30/2 30/7 30/24 31/10 31/16 31/21 31/22 32/20
one-third [3]	2/20 8/19 25/10
ones [2]	5/8 11/7
ongoing [1]	15/7
only [7]	4/7 5/16 15/25 18/4 23/21 26/14 27/15
operating [1]	18/22
opposed [1]	9/15
opt [1]	30/2
opt-out [1]	30/2
option [1]	22/20
or [29]	2/8 4/8 4/19 7/11 7/14 8/17 8/25 9/1 9/1 11/4 11/8 11/14 12/7 13/25 14/5 14/17 15/16 18/23 19/12 20/12 23/1 23/14 24/14 24/23 27/25 28/22 29/11 29/24 33/1
order [9]	4/5 15/22 17/2 17/5 28/23 29/18 30/11 30/21 33/6
ordered [2]	17/3 32/3
orderly [1]	14/8
ordinary [1]	23/20
other [11]	2/15 2/19 9/1 10/18 15/5 15/25 16/3 21/17 22/2 27/8 28/22
others [4]	1/3 8/23 20/25 27/4
Otherwise [1]	32/14
our [6]	5/5 15/18 17/17 22/6 31/8 31/9
out [27]	2/23 3/13 4/25 6/25 9/15 10/20 12/9 12/17 14/6 15/18 18/6 19/15 21/14 21/22 23/8 23/21 24/3 24/22 26/11 26/12 27/5 29/5 29/18 29/20 30/2 32/13 32/16
outside [1]	25/20
over [3]	4/13 4/18 16/8
overall [1]	25/3
oversight [1]	29/1
<b>P</b>	
pages [1]	29/22
paid [2]	23/13 23/18
papers [1]	7/7
part [8]	6/16 9/10 15/8 16/8 23/25 24/2 28/18 32/12
participate [1]	32/3
particularly [3]	22/11 22/16 31/11
parties [2]	13/19 31/8
partner [1]	15/18
partners [1]	20/25
party [2]	14/3 16/23
passed [1]	14/6
patient [16]	1/14 3/11 13/4 19/16 19/19 19/23 20/5 20/7 20/9 21/12 22/12 22/24 24/18 25/9 25/23 26/11
patients [1]	14/21
PATRICK [3]	1/18 3/16 4/17
pause [1]	7/9
pay [2]	23/23 33/8
payment [3]	14/25 22/20 31/10
pens [1]	3/13
people [5]	21/22 22/13 22/16 22/25 23/12
per [3]	19/5 22/4 24/6
percent [9]	6/10 8/4 8/12 23/21 23/22 24/22 24/24 25/3 26/9
percentage [1]	8/5
perfect [1]	12/25
performance [1]	17/4
person [2]	22/4 24/6
perspective [1]	8/2
physician [25]	1/17 2/15 3/16 6/1 9/5 9/6 11/10 13/4 14/15 14/25 16/9 18/11 18/24 19/6 19/17 19/20 19/24 20/5 21/15 24/11 25/23 26/6 26/9 27/17 32/1
physicians [1]	11/11
pick [1]	6/17
piece [1]	3/3
place [2]	12/8 28/22
places [2]	27/6 27/7
plaintiff [2]	3/7 17/5
plaintiffs [2]	1/5 16/21
plaintiffs' [1]	4/13
plan [1]	4/18
play [1]	5/16
pleadings [1]	17/17
pleased [1]	25/4
pocket [4]	21/14 23/8 23/21 24/3
point [8]	7/6 9/15 11/15 12/6 15/14 16/2 26/19 26/20
pointed [1]	27/5
points [1]	30/23
policies [7]	4/25 5/9 5/17 11/16 11/23 27/16 29/13
policy [4]	6/17 10/5 29/9 32/6
portion [1]	7/12
position [5]	4/20 5/5 10/23 15/11 17/14
positive [1]	29/1
possible [3]	18/17 32/15 32/16
postcards [1]	20/12
pot [3]	7/19 7/20 22/3
potentially [1]	14/7
practice [1]	31/1
practices [3]	14/15 14/22 14/23
practitioners [1]	31/1
pre [1]	18/22
pre-bankruptcy [1]	18/22
precise [1]	18/15
precision [1]	18/14
prejudice [1]	8/11
preliminary [2]	4/6 11/22
preparation [1]	13/7
prepared [1]	13/9
pres [2]	22/10 23/5
pretty [6]	4/5 17/13 24/25 25/6 30/1 32/11
prevalent [1]	22/21
primarily [1]	25/8
primary [1]	4/23
pro [5]	22/14 23/9 23/18 24/5 28/16
probably [6]	2/14 3/2 3/25 4/3 28/1 33/6
problem [6]	6/24 10/25 11/2 16/9 29/17 30/6
problems [4]	2/11 3/25 6/14 30/9
proceed [2]	14/8 15/10
proceedings [3]	1/11 1/24 34/6
proceeds [10]	5/9 5/19 7/10 7/14 7/20 7/21 16/7 17/1 17/2 17/18
process [5]	21/5 21/11 21/14 24/15 30/20

<b>P</b>	
produced [1]	1/25
professionalism [3]	31/14 31/20 32/18
propose [2]	21/22 27/21
proposed [1]	24/16
protect [3]	13/3 14/11 17/10
protective [1]	17/7
protects [1]	8/12
proud [1]	12/19
provide [4]	14/16 15/15 19/11 19/13
provided [2]	5/20 7/24
provides [1]	10/4
provision [1]	6/9
provisions [2]	15/5 16/15
pulled [1]	12/9
purchase [1]	13/16
purposes [1]	28/10
pursue [1]	5/19
pursuing [1]	5/25
<b>Q</b>	
question [7]	2/14 5/1 12/15 16/18 18/10 24/17 27/25
questions [15]	2/9 3/17 4/4 4/15 4/18 4/22 5/4 10/24 16/3 21/17 23/11 25/7 26/24 26/25 30/25
quick [1]	30/23
quickly [4]	25/25 29/18 32/12 32/17
quite [2]	4/11 22/20
<b>R</b>	
range [1]	24/6
rata [5]	22/14 23/9 23/18 24/5 28/16
rate [4]	25/3 26/13 26/14 26/15
rates [1]	30/8
rather [1]	7/13
reach [5]	2/18 24/24 25/3 27/21 32/4
reached [2]	28/3 31/9
read [4]	4/3 4/5 4/11 29/12
reading [1]	29/10
real [4]	3/3 15/25 16/4 27/15
realize [1]	11/3
realized [1]	11/4
really [16]	4/9 5/21 5/21 5/22 6/24 10/23 10/25 13/10 14/6 15/24 28/16 29/5 29/12 29/25 30/4 31/1
reason [4]	5/6 5/16 13/15 16/10
reasonable [10]	9/2 9/7 9/8 9/10 20/6 28/4 29/3 30/3 30/7 33/7
receive [4]	15/4 15/5 18/12 23/12
received [1]	15/3
receivership [1]	20/24
receives [1]	7/14
recently [1]	30/8
recipients [1]	17/2
recognizing [1]	31/22
recommendation [1]	22/11
record [5]	3/6 17/17 19/10 30/15 31/7
records [3]	14/17 15/8 20/22
recovery [3]	10/4 10/21 17/9
reduced [1]	7/20
refer [1]	21/25
reflect [1]	30/15
rehabilitation [1]	16/20
rejected [2]	5/10 8/8
related [1]	16/22
relationship [1]	25/19
relationships [1]	23/1
release [1]	14/4
relief [3]	15/6 18/4 28/23
remainder [2]	23/8 23/19
remember [1]	26/5
remise [2]	31/6 31/13
remote [2]	11/20 11/21
reported [3]	1/24 32/23 33/7
reporter [4]	1/22 1/24 34/3 34/11
represent [1]	13/10
representative [1]	13/4
representatives [4]	10/8 11/12 13/5 29/2
representing [2]	5/24 31/8
request [3]	10/14 19/12 22/20
requested [5]	19/8 22/13 25/10 26/8 26/9
requesting [1]	26/6
require [4]	5/1 5/6 8/3 27/20
required [2]	13/22 18/7
requirements [1]	30/18
requires [1]	16/24
resolution [1]	14/2
resolve [1]	7/6
resolved [1]	11/16
respect [1]	4/19
responsible [2]	11/12 29/2
rest [1]	4/21
restraining [1]	17/4
result [2]	9/8 15/21
resulted [1]	16/23
results [4]	12/19 17/25 19/5 19/21
retain [4]	5/3 6/9 11/7 28/9
retire [1]	12/4
right [14]	5/24 6/2 6/6 10/1 11/9 15/4 15/16 17/15 20/8 20/18 21/3 21/8 26/21 29/15
rightful [1]	5/19
rights [8]	5/9 5/17 5/25 6/22 14/11 14/23 15/13 15/23
rise [1]	14/20
risk [1]	16/9
road [1]	28/13
Rothchild [4]	1/20 3/22 31/15 32/5
rough [1]	18/14
round [2]	21/22 22/9
RPR [3]	1/22 34/3 34/11
rule [2]	29/10 30/18
rules [1]	9/24
run [2]	3/13 28/19
Russ [1]	3/14
<b>S</b>	
said [3]	4/6 7/16 25/10
sale [5]	15/10 15/22 17/18 17/20 17/25
same [3]	4/6 29/13 31/16
Saves [2]	22/22 22/23
say [8]	9/24 11/1 13/2 26/1 30/24 31/6 31/13 33/6
saying [2]	7/8 9/5
says [1]	28/15
scheduling [1]	32/19
seat [1]	25/17
seats [2]	13/5 25/23
second [2]	17/16 21/22
secondary [1]	23/4
secure [2]	15/22 25/17
secured [3]	13/6 13/11 17/22
see [3]	7/8 21/17 25/6
seek [1]	28/23
seem [1]	29/2
seemed [1]	30/6
seems [3]	2/22 4/11 10/9

<b>S</b>	
seen [4]	29/23 30/2 31/18 33/4
sell [1]	29/5
send [1]	21/22
sense [2]	22/4 22/7
sent [2]	2/8 10/20
separate [2]	5/6 25/12
separately [1]	19/8
service [1]	19/1
services [3]	14/17 14/17 14/18
session [1]	2/2
settle [6]	6/5 6/19 8/15 8/21 10/9 32/11
settled [1]	11/4
settlement [76]	
settlements [4]	9/25 22/2 23/20 32/25
settles [1]	8/24
seven [1]	29/24
share [2]	22/14 23/9
shoes [1]	5/18
should [4]	3/1 5/20 7/14 13/21
side [2]	22/12 31/16
similar [1]	26/18
similarly [1]	1/4
simplifies [1]	12/3
since [6]	18/19 18/20 22/12 22/16 24/13 24/14
sitting [1]	31/7
situated [1]	1/4
six [2]	24/21 29/24
size [1]	20/7
Slow [3]	13/8 14/19 19/25
small [1]	23/3
smoothly [1]	31/20
so [69]	
software [1]	14/17
some [13]	4/21 11/11 12/7 16/10 18/6 19/7 20/20 24/6 25/22 27/25 28/22 29/8 29/22
somebody [3]	3/1 11/23 33/8
something [4]	9/9 12/18 29/3 33/6
somewhere [1]	3/1
soon [2]	32/15 32/16
sort [1]	3/2
sounds [1]	28/5
SPAUGH [3]	1/18 3/16 4/17
speak [2]	20/15 21/13
specific [6]	4/20 10/4 13/1 17/3 19/13 21/25
spent [1]	30/16
squirrely [1]	13/14
stage [1]	32/13
standard [1]	30/20
standing [1]	5/18
start [2]	4/14 4/23
started [2]	21/5 32/25
state [3]	3/24 16/20 29/9
STATES [4]	1/1 1/12 34/3 34/11
stay [1]	25/25
stenotype [1]	1/24
step [2]	13/12 14/13
still [14]	2/16 2/17 2/23 4/11 5/25 7/12 9/24 10/8 15/1 16/15 23/23 27/3 27/6 28/6
Street [1]	34/12
subject [2]	17/21 27/18
submission [1]	18/16
submissions [1]	24/14
submits [1]	19/6
submitted [2]	5/10 18/18
subsumed [1]	6/11
sue [4]	7/4 8/17 8/17 8/17
superior [1]	17/3
supplement [2]	19/11 25/2
supplemental [1]	32/21
supplemented [1]	25/1
support [1]	10/22
supposed [1]	29/4
sure [13]	2/11 2/13 3/3 11/22 17/9 26/12 27/19 28/2 29/3 29/8 29/20 30/17 31/4
surprised [1]	12/21
SUTTON [1]	1/14
<b>T</b>	
take [5]	9/23 10/6 12/6 17/18 23/12
taken [1]	27/8
taking [1]	15/10
talk [2]	12/18 27/16
technical [1]	3/4
tell [5]	4/15 26/22 27/21 27/24 30/22
telling [2]	20/25 27/18
temporary [1]	17/4
ten [1]	29/24
terminate [1]	15/4
termination [1]	15/16
terms [2]	10/18 11/7
than [8]	7/5 7/13 8/23 23/2 23/17 26/11 26/15 30/4
thank [6]	24/9 27/14 30/24 31/4 31/24 33/10
that [219]	
that -- if [1]	8/23
that -- well [1]	7/16
that's [35]	
their [8]	5/10 8/14 13/5 14/11 15/3 16/19 23/2 31/21
them [25]	2/5 4/19 6/18 6/19 6/25 7/4 8/7 8/9 8/13 8/17 8/25 9/1 16/25 20/19 20/21 21/23 22/19 28/14 29/5 29/14 29/24 32/23 33/3 33/4 33/7
themselves [2]	3/5 17/9
then [17]	3/1 4/20 7/25 8/10 12/5 12/6 14/6 14/7 16/9 17/4 18/18 22/4 22/9 23/18 23/23 25/1 27/25
there [37]	
therein [1]	15/6
these [11]	2/10 2/15 5/7 13/3 13/21 14/9 14/15 14/16 14/16 29/1 32/25
they [47]	
they've [2]	6/18 33/2
thing [5]	4/6 8/17 10/18 18/23 29/14
things [3]	12/3 13/14 32/19
think [47]	
third [6]	2/20 6/24 7/5 8/19 25/10 28/15
thirty [1]	29/22
this [45]	
THOMAS [1]	1/18
those [30]	2/19 2/24 4/3 5/2 5/3 5/9 5/15 5/17 5/25 11/15 11/23 14/18 14/21 14/23 15/23 15/25 16/4 17/2 17/21 18/21 21/1 21/7 23/8 23/17 23/22 23/23 24/3 27/22 28/3 33/5
though [3]	7/6 10/14 18/1
three [1]	33/1
through [9]	8/10 14/24 21/9 21/24 22/17 22/18 25/7 31/17 31/19
Thursday [1]	29/19
tied [1]	27/3
time [5]	12/17 22/14 29/14 30/17 31/3
timeline [1]	18/22
times [1]	15/19

<b>T</b>	
today [2] 24/8 24/14	valid [4] 19/6 21/10 23/22 24/4
today's [1] 4/23	various [1] 20/24
together [1] 31/15	Vegas [1] 23/17
tomorrow [1] 12/5	Venmo [1] 23/2
too [1] 32/16	verdict [2] 8/18 28/14
took [3] 11/1 13/2 16/11	verification [1] 21/14
top [3] 8/1 9/15 26/8	very [7] 5/4 22/25 25/4 29/2 29/2 30/3 30/7
topline [1] 17/20	via [1] 20/9
total [3] 19/14 19/18 19/21	view [2] 2/12 29/13
touch [1] 3/25	vigorously [1] 13/22
towards [1] 15/3	vision [1] 32/1
transcript [4] 1/11 1/25 33/8 34/5	voice [1] 31/16
transcription [1] 1/25	<b>W</b>
transfer [2] 15/23 20/15	wait [1] 11/1
transfer -- well [1] 20/15	want [19] 2/11 2/22 4/2 4/16 9/15 17/10 17/15 26/3 26/22 27/15 27/18 27/23 27/24 28/19 29/8 30/15 30/22 30/24 33/8
transferred [1] 16/25	wanted [3] 13/15 13/17 31/23
trend [1] 23/20	warranted [1] 20/6
trial [1] 7/7	was [36]
tried [2] 8/8 32/12	wasn't [3] 16/7 16/10 20/11
true [1] 34/5	wasting [1] 32/6
try [5] 13/2 27/23 29/18 29/21 32/12	way [7] 9/19 10/13 18/13 20/20 26/1 27/19 33/2
trying [10] 9/17 10/14 17/8 22/9 25/21 31/10 31/15 31/16 31/16 32/10	ways [1] 13/23
trying -- what [1] 10/14	we [73]
turn [1] 4/13	we're [5] 2/3 8/6 10/13 13/19 24/6
two [9] 2/15 2/19 4/25 11/16 27/16 27/22 29/19 30/23 31/6	we've [4] 16/5 22/1 26/23 31/14
type [2] 8/6 13/1	week [2] 11/3 30/8
typically [1] 23/21	weeks [2] 29/19 32/14
<b>U</b>	well [9] 6/20 7/16 12/3 13/2 15/9 20/15 21/12 22/25 29/16
ultimate [3] 10/15 14/13 18/16	well-appreciated [1] 22/25
ultimately [7] 9/21 10/12 10/12 14/7 14/10 15/21 21/19	went [4] 24/22 25/16 31/19 32/10
unanticipated [1] 12/18	were [22] 12/12 12/21 15/9 15/21 16/9 18/22 19/1 20/11 20/13 20/19 20/20 23/13 23/17 24/4 24/4 24/22 25/4 25/8 25/16 25/19 29/12 33/7
uncashed [3] 21/18 21/21 22/2	what [28] 2/5 5/2 6/7 7/8 7/19 8/21 8/22 8/24 9/3 9/4 9/10 10/14 14/20 15/9 17/24 19/20 22/1 22/10 23/12 26/6 26/13 26/20 26/22 27/17 27/17 28/15 30/15 31/22
uncomfortable [1] 28/25	what -- I [1] 26/13
undeliverable [1] 24/23	What's [1] 2/17
under [7] 5/9 5/17 13/18 15/1 15/13 16/8 18/22	whatever [3] 6/25 9/20 25/11
underinsured [1] 29/11	whatsoever [1] 7/20
underlying [3] 14/14 14/16 16/21	when [9] 2/23 12/21 15/2 21/5 29/9 30/13 31/3 31/9 32/25
understand [4] 7/9 26/3 30/17 30/25	whenever [1] 11/4
understand -- I [1] 30/25	where [14] 6/4 8/16 11/16 11/25 12/1 12/11 12/12 13/14 14/4 17/5 22/6 22/7 28/11 28/18
understanding [6] 2/13 16/6 16/23 16/24 21/20 28/20	whereas [1] 21/15
understood [1] 26/25	whether [1] 13/25
unfortunate [1] 14/6	which [12] 8/10 12/4 14/10 20/20 22/13 22/20 22/24 23/14 25/8 30/11 32/2 32/4
uninsured [1] 29/11	while [2] 7/10 20/24
UNITED [4] 1/1 1/12 34/3 34/11	WHITE [2] 1/16 3/8
unknown [1] 7/3	who [16] 3/1 3/16 6/21 10/6 10/9 11/7 11/7 11/12 11/22 15/14 17/22 19/6 20/21 20/25 21/22 25/20
unknowns [1] 28/21	why [9] 10/19 11/1 12/25 13/21 17/7 18/7 20/18 21/4 30/11
unless [1] 10/24	will [14] 7/20 11/24 13/25 16/14 16/15 18/19 21/19 22/19 23/3 23/12 28/6 28/9 30/20 32/14
unsecured [4] 18/3 18/5 25/17 25/24	Winchester [1] 2/8
untenable [1] 17/13	
until [4] 11/3 11/19 12/4 13/24	
up [11] 6/5 6/20 8/7 10/16 10/17 12/4 12/7 17/13 21/16 27/3 28/21	
us [23] 3/23 7/17 8/13 9/17 9/19 10/13 12/17 13/22 22/5 23/17 24/8 25/14 25/20 25/21 25/22 25/25 30/24 31/1 31/3 31/7 31/15 32/4	
USA [1] 1/19	
use [1] 23/22	
using [1] 25/14	
<b>V</b>	
vacation [1] 29/19	

**W**

within [4] 6/13 6/13 8/3 14/12  
without [3] 6/6 7/7 8/11  
witnesses [1] 15/21  
Womble [4] 1/19 3/15 4/17 31/14  
wondering [1] 8/16  
word [1] 11/15  
work [6] 6/25 8/13 18/6 19/11 21/10 21/24  
worked [3] 12/17 13/3 13/5  
working [1] 31/15  
works [1] 22/5  
worry [1] 27/11  
worth [1] 22/9  
would [47]  
write [2] 8/7 26/5  
wrong [1] 12/8

**Y**

yeah [2] 17/10 23/15  
year [2] 11/4 15/2  
years [2] 7/1 29/25  
yes [13] 3/21 13/9 16/13 22/1 24/21 26/1  
26/7 26/18 27/7 27/10 28/8 28/12 30/23  
York [1] 15/19  
you [117]  
you -- I [1] 27/24  
you -- it [1] 8/21  
you'll [2] 4/14 32/14  
you're [3] 7/5 14/3 29/6  
you've [1] 4/18  
you-all [2] 30/10 32/22  
you-all's [2] 26/10 32/18  
your [42]

**Z**

zealous [1] 31/21  
zero [1] 22/7  
zillion [1] 7/1